

**DEPARTMENT OF TOXIC SUBSTANCES CONTROL
HAZARDOUS WASTE MANAGEMENT PROGRAM
POLICY AND PROCEDURE**

POLICY AND PROCEDURE: EO-03-001-PP

TITLE: Sharing Administrative Penalty Calculation Information

AFFECTED PROGRAMS: Office of Legal Counsel and Investigations (Criminal Investigations Branch, Task Force Support & Special Investigations Branch); Hazardous Waste Management Program (Statewide Compliance Division)

TABLE OF CONTENTS

	Page
I. PURPOSE	1
II. AUTHORITY	1
III. POLICY	1

DEPARTMENT OF TOXIC SUBSTANCES CONTROL
SHARING ADMINISTRATIVE PENALTY CALCULATION INFORMATION
POLICY AND PROCEDURE

EO-03-001-PP

I. PURPOSE

This procedure provides guidance to the Department of Toxic Substances Control (DTSC) staff regarding how and when staff may share privileged penalty calculation information with Respondents or their representatives during settlement negotiations for administrative orders.

II. AUTHORITY

The Health and Safety Code section 25187 authorizes DTSC or a unified program agency to issue an order requiring that a violation be corrected and imposing an administrative penalty for any violation of chapter 6.5 of the Health and Safety Code or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to this chapter. The California Code of Regulations, title 22, chapter 22, article 3, provides for the calculation of administrative penalties in accordance with chapter 6.5 of the Health and Safety Code.

III. POLICY

- A. Under normal circumstances certain privileged penalty calculation information may be shared with the Respondent or the Respondent's representative to facilitate meaningful settlement negotiations regarding an administrative order.

Penalty calculation information shared with the Respondent or the Respondent's representative will usually include the following:

1. Identification of the most significant violations and an explanation as to why these violations are considered significant, the percent of the total penalty attributable to each of these significant violations and the base penalty for each of these violations. For the purposes of these guidelines, the "most significant violations" in any given negotiation shall mean those violations that DTSC determines to have the greatest relative potential for harm to the environment or to public health and safety. The "most significant violations" will normally include those violations that individually constitute at least ten percent to twenty percent of the total proposed penalty.

DEPARTMENT OF TOXIC SUBSTANCES CONTROL
SHARING ADMINISTRATIVE PENALTY CALCULATION INFORMATION
POLICY AND PROCEDURE

EO-03-001-PP

2. Identification of any factors (e.g., compliance history) for which penalty adjustments were made up or down, and a brief explanation as to why these factors warranted penalty adjustments.
 3. Economic benefit information, including the amount of the economic benefit and the basis for the amount.
 4. Identification of those violations for which multi-day penalties have been assessed, including the number of days.
- B. Penalty calculation information will normally be shared with the Respondent as follows:
1. Penalty calculation information will be shared subject to the provisions of the Evidence Code section 1152 restricting the admissibility of statements made in settlement negotiations. The information will be shared subject to an explicit waiver of attorney-client and attorney-work product privileges as to that specific information only. DTSC will explicitly retain all relevant privileges, such as attorney-client or attorney work-product, as to all other information.
 2. Penalty calculation information will be shared orally. Respondents will be advised that penalty calculations remain subject to change until an agreement is reached.
 3. Penalty calculation information will normally be shared after substantial agreement on the facts and gravity of the violations has been achieved.
 4. Once a case has been referred to the Office of the Attorney General, DTSC will consult, when appropriate, with the assigned Deputy Attorney General in all decisions regarding settlement negotiations.
- C. This policy is intended to foster open and productive negotiations. However, this policy neither requires nor forbids the disclosure of penalty calculation information in full or in part. DTSC believes that there are circumstances

DEPARTMENT OF TOXIC SUBSTANCES CONTROL
SHARING ADMINISTRATIVE PENALTY CALCULATION INFORMATION
POLICY AND PROCEDURE

EO-03-001-PP

where either complete disclosure or non-disclosure of penalty calculation information is appropriate; but, these circumstances will not constitute the normal situation. The timing and extent of disclosure of information shall be within the sound discretion of the DTSC negotiating team, and, when appropriate, the assigned Deputy Attorney General.

CONTACT:

Department of Toxic Substances Control
Hazardous Waste Management Program
Regulatory and Program Development Division
1001 "I" Street, 11th Floor
P.O. Box 806
Sacramento, California 95812-0806
(916) 323-6042 (916) 322-0349

OR

Mr. George Rose
Compliance Program
Development Division
(916) 445-1664
grose@dtsc.ca.gov

This policy and procedure is intended to provide guidance on administrative order settlement activities. However, the policy and procedure does not replace or supersede relevant statutes and regulations. The information contained in this policy and procedure is based upon the statutes and regulations in effect as of the date the policy and procedure was signed. Interested parties are advised to keep apprised of subsequent changes to relevant statutes and regulations.

This policy and procedure expires five years from the date of signature.

August 14, 2003

Date

[original signed by]

Edwin F. Lowry

Director

Department of Toxic Substances Control